

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 209 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

JAINI PUBLISHERS

Versus

MARUTI COMMUNICATIONS LTD

Appearance:

1. COMPANY PETITION No. 209 of 1996
MS MANISHA LAVKUMAR for Petitioner
MR RAMNANDAN SINGH for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 14/06/2000

ORAL JUDGEMENT

1. The petitioners - Traders Limited and another
have filed this winding up petition under Sections 433

and 434 of the Companies Act for winding up of Maruti Communication Ltd, Vadodara, having its registered office at Vadodara. It was stated that company is carrying on business of financial advertising with regard to public issue of companies and other related matters. On behalf of its clients it places order for advertisement in daily newspapers, weeklies and other fortnightly publications.

2. In the petition it was stated that as per the companies instructions the petitioners placed the order of advertisement in the respective newspapers, weekly or other fortnight publications. It was stated that after the publication of advertisement, the company was to make the payment within 30 days as per the date of invoices failing which the petitioners were entitled to receive interest at the rate of 24% per annum. It was further stated that the petitioner had repeatedly requested the company to make the payment of the aforesaid invoices. However, the company has failed and neglected to make the payment.

3. It may be stated that M/s. Jaini Publishers original petitioner filed company petition no. 209 of 1996 on 3.10.1996. The statutory notice was issued on 16th April, 1996 as company failed to make the payment and, therefore, winding up petitioner was filed on October, 1996. However, it appears that Traders Ltd. and Gujarat Samachar filed the application/petition in which it may be stated that this Court passed the order of admission on 19th February, 1997 and the advertisement was also published in the Gujarat daily and Loksatta on 4th April, 1997 and English daily Indian Express on 3rd April, 1997.

4. It appears that on 29th April, 1997 M/s. Gujarat Samachar supporting the winding up petition of the respondent company addressed letter to the advocate appearing for the petitioner raising a demand of Rs. 6,34,434.63 (Rupees Six lacs Thirty Four thousand Four hundred and Thirty Four and Sixty Three paise only) have due and payable by the respondent company. An affidavit placing the details of the amounts due and payable was filed on 2.5.1997. It was further stated that petitioner no.1 Traders Ltd. also addressed a letter to the advocate on 15.10.1997 in support of the winding up of the respondent company. A sum of Rs. 12,49,064.94 (Rupees Twelve lacs Forty Nine thousand Sixty Four and Ninety Four paise only) was raised as the amount due and payable. An affidavit placing the said letter and accounts statements of record was filed on 12.11.1997. Thus, the petitioner nos. 1 and 2 in the main matter 209

of 1996 joined as petitioner. The amended petition was filed on 3rd April, 1998.

5. The respondent company has filed an affidavit-in-reply on 24th November, 1998 and stated that the present petition is not maintainable by law. It was stated that so far as the Traders Ltd. is concerned, the respondent company owes the amount of Rs. 6,92,000/(Rupees Six lacs Ninety Two thousand only) and so far as the Gujarat Samachar is concerned, the respondent company only owes the amount of Rs. 3,18,250/- (Rupees Three lacs Eighteen thousand Two hundred and Fifty only). Thus, the claim which is put up by the petitioners is disputed and on that ground alone this petition is not maintainable. It was further stated that the respondent company is only facing some temporary financial crisis and debtors of the company have not paid the dues to which the company is entitled. It was stated that amongst various debtors two debtors owe an amount of Rs. 20,73,710/- (Rupees Twenty lacs Seventy Three thousand Seven hundred and Ten only) to the respondent company. In view of the same, the respondent company has to recover large amount of monies from its debtors, who have defaulted the payments in favour of the respondent company. It was stated that as soon as the amounts are recovered from the debtors of the company, the respondent company will settle the dues with the present petitioners. Thus, the respondent company is having genuine difficulty in settling the dues with the petitioners.

6. The petitioners have filed affidavit in rejoinder on 2nd December, 1998. It was stated that by making vague statement unsubstantiated by any evidence on record, the respondent company, cannot absolve itself of its liability to make payments to the petitioners on the baseless ground of disputed debts. In para. 5.1 of the affidavit in rejoinder, it was stated that investment to the tune of Rs. 12,13,106/- (Rupees Twelve lacs Thirteen thousand One hundred and Six only) in the year 1995-96 is valued the year 1996-97 at Rs. 4,55,200/- (Rupees Four lacs Fifty Five thousand Two hundred only). The share capital reserve of the company is thus completely wiped off. There is an erosion of more than Rs. 7,00,000/- (Rupees Seven lacs only) in the period 1995-96. As no balance sheet has been by the respondent company.

7. Section 433 of the Companies Act provides the circumstances in which the company may be wound up by court, and reads as under :

"Section 433 Circumstances in which company may be wound up by court -A company may be wound up by the Court --

- (a) If the company has, by special resolution, resolved that the company may be wound up by the court ;
- (b) If default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;
- (c) If the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
- (d) If the number of members is reduced in the case of a public company, below seven, and in the case of a private company, below two;
- (e) If the company is unable to pay its debts;
- (f) if the court is of opinion that it is just and equitable that the company should be wound up;

Section 434 of the Companies Act provides for the company when deemed unable to pay its debts.

8. I have gone through the papers of the case and I am of the view that the expression "unable to pay its debts" should be taken in the commercial sense of being unable to meet current demands. Looking to the facts and circumstances of the case, the company was neither in position to discharge its debts or to generate funds nor had placed any scheme before this Court for improvement of its workings. This Court had no other option but to order winding up of the company. I am of the view that in view of the Section 434 of the Companies Act, failure on the part of the debtor company to pay the creditor would create a presumption of insolvency against the company. I am of the view that company has not produced its balancesheet and company has become commercially insolvent and in view of the facts and circumstances of the case, substratum of the company has also disappeared. In my view therefore this fact shows that there is a commercial insolvency on the part of the company. That since 1995-96 and 1996-97, the company has not filed any balancesheet which shows that company is not carrying on its business for number of years and, therefore, petitioner has made out a case of inability of its debts

and company has chosen not to file any reply to the statutory reply and even, the defence which has been raised by the respondent company is not bonafide defence. When the petitioner has also issued advertisement, company has not appeared before this Court to oppose the winding up petition. I am of the view that expression "neglects to pay the sum demanded" in section 434(1)(a) is not equivalent to the word "omitted". Neglect to pay a debt on demand is omission to pay without reasonable cause. I am of the view that failure to pay inspite of several communications including service of statutory notice was held to be evidence of neglect and inability.

8.A. The learned counsel for the petitioner has also relied upon the judgement of this Court in the case of Ficom Organics Ltd. Vs. Laffans Petrochemicals Ltd., reported in 2000 (Vol 99) 471 observed that company has raised bonafide defence and therefore also the Court should not considered the defence raised by the respondent and, therefore, winding up order should be passed. The Court on page 478 has observed as under :

"IV. Court's findings on bona fides of company's defence and orders which may be passed upon such findings.

(1) After considering the material on record,
if the Court comes to the conclusion that the defence raised by the company is not only not bona fide, but the defence is reeking with mala fides or the company's conduct leading to the dispute (in respect of which the company's defence is found to be not bona fide) was dishonest, the court would admit the petition and pass an order for advertisement."

9. I am of the view that there is no possibility of promoting the business of the company and this is a proper case for winding up of the company on the just and equitable grounds also. For the reasons stated In view of the same, I order wind up of company as well as Official Liquidator attached to this Court be appointed as Provisional Liquidator.

(K.M.Mehta,J)
(Vipul)